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Calvin N. Hall and Rita M. Hall v. Perry G. Fitzgerald, Carolyn S. Fitzgerald et al : Reply Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

CALVIN N. HALL, and RITA M. HALL, Plaintiffs-Respondents, vs. PERRY G. FITZGERALD, CAROLYN S. FITZGERALD, et al., Defendants-Appellants	Case No. 18371

REPLY BRIEF OF APPELLANTS

Appeal from Judgment and Order of the
Fourth Judicial District Court of Utah County
Honorable Allen B. Sorenson, Judge

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ARGUMENT

POINT 1

THE LOWER COURT ERRED IN GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS THERE WERE GENUINE ISSUES AS TO MATERIAL FACTS AND PLAINTIFFS WERE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Plaintiffs claim that "defendants never denied that the Uniform Real Estate Contract attached to Mr. Hall's affidavit was not the agreed contract" (P. 4). This simply is not true. In their proposed Amended Answer defendants asserted that the Exhibit "A" (which was incomplete on the Complaint) was not the agreement of the parties as it did not contain a release clause as agreed upon. There is nothing in Mr. Hall's affidavit which expressly refers to a release clause so that defendants would risk being foreclosed on that issue for failure to rebut it under oath.

With respect to Rule 56(e), plaintiffs ignore the alternative to an affidavit provided therein, to-wit a response "as otherwise provided in

this Rule." Before the ruling on the Motion for Summary Judgment defendants moved to amend their Answer. That motion was not ruled upon and hence the conditions set forth in Rule 56(d) were not met, to-wit "judgment is not rendered upon the whole case" as the issue as to a release clause was not ruled upon and had not been addressed by the subject affidavit. Plaintiffs seek to avoid the foregoing by contending ipse dixit that "amendments to defendants' Answer do not substantially change the issues as originally formulated" (P. 4). In the next paragraph, however, it is conceded that it raised the issue of the release clause but that such issue does not constitute a legal defense as it "would not affect defendants' liability to make full and timely payment to the plaintiffs." Defendants do not contend that such a clause would affect their liability to pay as agreed but it certainly would affect their ability to make such payments since sales of release ground have been the means of performance on this type of contract. At the very least the Court could not properly conclude otherwise without an evidentiary hearing.

POINT II

THE LOWER COURT ERRED IN DENYING DEFENDANTS' MOTION TO SET ASIDE JUDGMENT BASED ON NEWLY DISCOVERED EVIDENCE WHICH BY DUE DILIGENCE COULD NOT HAVE BEEN DISCOVERED AND PRESENTED AT THE TIME THE COURT HEARD PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

Plaintiffs contend that the newly discovered evidence (that plaintiffs had arranged with their sellers to apply plaintiffs' payment to those sellers on the contract which had to be kept current to perform the instant

contract) was "the exclusive knowledge of defendants-appellants (at critical times)." Not so. The newly discovered evidence was not the payment made by defendants to Leland Fitzgerald (plaintiffs' seller) which initially was in their knowledge to the exclusion of plaintiffs' knowledge but rather the application of that payment (to the contract referred to in paragraph 11 of the subject contract) rather than the retention of that payment by Fitzgerald toward a new contract contemplated between him and defendants if plaintiffs defaulted out. Knowledge of the application was exclusively known only to plaintiffs and Fitzgerald and the latter's affidavit made it clear that defendants learned of this evidence only since the summary judgment was rendered (R. 79).

Without any support in the record whatsoever plaintiffs make the pejorative assertion that there was "collusion" between their sellers Fitzgerald and the Fitzgerald defendants (P. 6). Certainly neither the lower court nor this one may so find without an evidentiary hearing. In the same paragraph they assert that the payment was partial which is contrary to the facts (R. 79).

When plaintiffs assert that the payment in question was "without the consent or knowledge of the plaintiff" they again confuse the payment with its application to their contract with their seller which could only have been made with their knowledge and consent.

POINT III

THE LOWER COURT ERRED IN GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS PLAINTIFFS HAD NOT PASSED TITLE TO DEFENDANTS IN ACCORD WITH PARAGRAPH 16 OF THE UNIFORM REAL ESTATE CONTRACT.

A

Title was not Properly Passed from Plaintiffs to Defendanta via a Warranty Deed Deposited with the Fourth Judicial District Court.

Plaintiffs seek to dispose of this issue with a single sentence based entirely on ipse dixit. It is too elementary to require case citation to establish the fact that a deed which is lodged in a court file does not establish the claim of title necessary to convey good marketable title. No authority is given as to the power of defendants to remove the deed from the court file even if its location there were the only objection to its passing title. Certainly the filing in court of a deed in a regular real property transfer would be insufficient and the burden is on plaintiffs to establish the validity of such a delivery.

B

An Issue Not Raised in the Court Below May Be Raised on Appeal when the Lower Court does not Conduct a Trial.

Defendants would agree with this part of plaintiffs brief if the case had reached the final stage of where the defense of failure to state a claim may be asserted under Rule 12(h) but this case never reached that stage and hence it may be raised here since defendants did not have the final opportunity to raise it in the lower court at the time provided by the rule because of the procedure utilized by the lower ourt. It surely is contrary to the spirit of pleading under the rules for the Court not to decide causes on the merits unless the rules clearly foreclose that being done.

C

Defendants did not Waive Any Objection to Plaintiffs' Tender of Title.

Plaintiffs contend under this point that the defense of failure to "pass title to Buyers (defendants)" pursuant to paragraph 16C of the subject contract is an affirmative defense that must be pleaded specifically under Rule 8(c). Rule 8 , however, lists all the 19 defenses denominated and this defense is not one of those enumerated. As noted above it is incumbent upon the plaintiff to both plead and to prove the performance or compliance with every covenant and condition to establish a legal claim and Rule 8(c) does not have the legal effect of shifting that burden. Furthermore, as is true with respect to nearly every legal proposition urged upon this Court by plaintiffs, plaintiffs cite no case precedent to sustain their position on this issue.

D

The Fourth Judicial District Court did not Properly Foreclose the Subject Uniform Real Estate Contract as a Note and Mortgage.

At this point in their brief plaintiffs concede that "there must be a validly executed deed and delivery of the deed" (P. 9). They contend, however, that a delivery to the clerk of the court of a deed to be filed in the foreclosure file is a valid delivery. No case for this extra-ordinary proposition is cited. Nor is any authority of the clerk to deliver that deed cited. Nor has the judgment appealed from in this case addressed that factor. Surely defendants did not bargain merely for a valid "trans-action between the parties" (P. 9). They bargained for and should receive

a deed that gives them good marketable title of record. Certainly the deed which is R84 does not do that.

Plaintiffs correctly observe that defendants object to a deed from plaintiffs only when the title remained in plaintiffs' sellers (Leland A. Fitzgerald and wife).

Plaintiffs cite two cases to support the proposition that plaintiffs need not have marketable title to sustain their action and the validity of the deed in question.

In the Woodward case, the first cited which is reported as 1 U. 2d 220, 265 P.2d 398 (1953) plaintiffs there did not sue for the full price as the instant plaintiffs have done but "only as a request for judgment as to such installments and attorneys' fees." (P. 399). There the court said:

> Defendant's attack on the marketability of plaintiff's title was premature since, under the authorities, that fact is determinable, not as of the date of execution of the contract but as of the time a vendee tenders that which under the contract, would require the vendor to transfer not only marketable title, but the title which the latter agreed to convey.

Here the issue of marketability of seller's title is not premature because the issue was not raised as of the contract's execution but as of the time the contract required the title to pass. At that time the quality of the title is most germane to the intention of the parties and to the terms of the contract.

The second case plaintiffs cited on the issue of marketability of title is Corporation Nine v. Taylor, 30 U.2d 47, 513 P.2d 417 (1973). That case involved an action by sellers to terminate the contract due to buyer's breaches and a consolidated action by buyer for specific performance rather than a 16 C action under a uniform real estate contract

as in this case. There the court, consistent with Woodward, supra, said:

> "First, the law does not require the vendor to have clear and marketable title at all times during the performance of his contract and is not ordinarily so obligated until the time comes for him to perform (underscoring added).

In the instant case the time for performance had arrived and unless the plaintiffs had such marketable title as would enable them to convey good marketable title to defendants as purchasers, then their deed would not and did not meet the requirements of 16 C.

It's true that defendants have not found a case exactly in point to sustain their position on this issue as this case is apparently one of first impression but certainly neither of the cases cited by plaintiffs are anywhere near being "on all fours." In fact their dicta strongly supports plaintiffs' position. Plaintiffs respectfully submit that the lack of precedent in this situation is probably due to the fact that prior sellers did not believe they could succeed in obtaining a judgment for the full purchase price under 16 C unless they could deliver the full title rather than a fraction of the full title since the contract contemplated full title for full price.

As for the two cases cited by plaintiffs regarding the necessity of a "tender of deed" those cases would be useless even if they stood for the proposition that no such tender would be required in circumstances like those in this case since the contractual provision in question required plaintiffs to "pass title to buyer" not "tender title to buyer." However the holdings in Vanderwilt v. Broerman, 201 Iowa 1107, 206 NW 559

(1926) and Miami Bond and Mortgage Company v. Bell 133 So. 547 (Florida, 1931) involved factual situations totally different from this case. In the first case "the suit is under the statute against the vender in possession to foreclose" (P. 962). The statute in question (Sec. 4297) provided inter alia:

> The vendor may file his petition asking the Court to require the purchaser to perform his contract or to foreclose and sell his interest in the property.

The Court in its opinion observed that the lower court "could so mold its decree as to protect the interests of all"(P. 962).

The difference between the statute in Vanderwilt and the contract in this case is so vast as to make the dicta in that case meaningless in deciding rights and duties under this contract.

In Bell the court said:

> This is not a suit at law to recover the full purchase price of the lands to be conveyed nor is it one for specific performance of a contract and therefore the rule that "where in a contract for the sale of land the covenant of vendee to pay the purchase price and the covenant of the vendor to convey are dependent and both covenants are to be performed at the same time and the tender of deed is a condition precedent to an action at law to recover the total purchase price and to the maintenance by the vendor of an action in equity for specific performance of the contract" is not applicable.

Here the suit was one to recover the full purchase price and is in substance an action for specific performance and hence the rule quoted would be applicable except for the fact that the contract by its express terms required a conveyance rather than a tender as noted above.

E

The Error in Plaintiffs' Conveyance of Title Was Not Harmless Error and Defendants Were Prejudiced Thereby

It's hard to conceive of a case where there was more prejudice caused a party in a case involving sums under half a million dollars than in this case. To state as plaintiffs do on Page 10 of their brief that "defendants were not prejudiced thereby" is the sheerest of ipse dixit reasoning which flies in the face of reality, the reality that defendants have a judgment against them for roughly half a million dollars in return for property of that approximate value which is subject to a prior encumbrance of over 50% of that value. If getting half a loaf for full price of the loaf is not prejudicial, that term has no meaning. Certainly, neither Startin (237 P 2d 834, a 1951 case) nor Boyd (146 P 272, a 1915 case) do not stand for the proposition that getting half of that bargained for is not prejudicial. The first involved the value of services rather than the diminished value of property because title is still in sellers' sellers until over 50% of the value is paid to them. That case is so extremely remote from the one at bar as to be useless. The second is even more remote as it involved a tort action for wrongful death.

POINT IV

THE LOWER COURT ERRED IN THE ENTRY OF JUDGMENT IN ACCORD WITH SEC. 78-37-1 AND SEC. 78-37-2, UTAH CODE, 1953.

A

The Fourth Judicial District Court did not Properly Adjudge an Amount Due.

Plaintiffs contend under this point that "adjudging the amount due" is equivalent to "entering judgment for the sum determined to be due." This is not so. Certainly it is not necessary that judgment for the amount due must be entered as distinguished from its determination to "make bids or make disbursements to the parties" (P. 11).

To interpret Sec. 78-37-1 in the above manner is to defeat its purpose, namely to have the debt satisfied primarily by the security in question so that other real property of the debtor is not impaired pending the determination of the deficiency, if any.

B

Mootness is not an Issue in This Appeal.

Plaintiffs cite facts outside the record and violate their own urging that this Court not consider matters not presented to the lower court.

It would obviously be improper for this court to adjudicate the legal effect of facts accurring after this appeal was instituted and particularly when plaintiff sought by the execution sale of July 1, 1982, to do an end run around Perkins v. Spencer by the exercise of 16 C and the purchase of defendants' position to forfeit all payments made before which effectively converted a 16 C remedy into a 16 A remedy in such a manner that the lower court had no opportunity to apply the principles of Perkins v. Spencer to these facts. That case is reported in 121 U. 468, 243 P.2d 446.

CONCLUSION

The summary judgment appealed from should be reversed and the case tried upon its merits.

Dated this 20th day of September, 1982.

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MAILING CERTIFICATE

I hereby certify that on the 20th day of September, 1982, a true and correct copy of the foregoing Brief of Appellants was mailed, postage fully prepaid, to the following:

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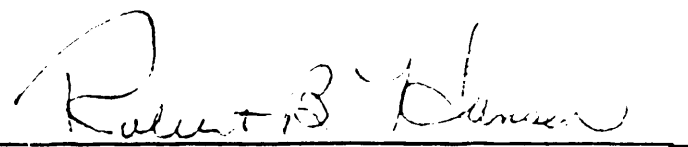

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